Petition

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No. _____

IN THE

Supreme Court of the United States

October Term, 1981

Paul R. Kitch, Petitioner,

v.

Victor Delano, First National Bank in Wichita, as executor of the estate of Marcellus M. Murdock, Victoria Bloom, and Harry B. Brown, Jr., Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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ISSUES PRESENTED

1. Did the court of appeals, in refusing to apply the established Kansas control stock sale doctrine in this diversity case involving the sale of controlling stock of a Kansas corporation, so flagrantly ignore its duty to apply state law as the rule of decision under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), as to call for the exercise by this Court of its power of supervision?

2. Did the court of appeals abuse its discretion under *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), by refusing to certify the question of state law to the Kansas Supreme Court after having declared the only relevant Kansas case inapplicable and having conceded that there was no case in point in Kansas or any other jurisdiction in support of its holding?

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FOR THE TENTH CIRCUIT

REPORTS OF OPINIONS

Petition prays for review of the opinion of the Tenth Circuit Court of Appeals reported as *Delano v. Kitch*, 663 F.2d 990 (10th Cir. October 23, 1981). A prior appeal of this action to the Tenth Circuit Court of Appeals is reported as *Delano v. Kitch*, 542 F.2d 550, *opinion on motion for clarification*, 554 F.2d 1004 (10th Cir. 1976).

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 17.1(a). The judgment to be reviewed is the Opinion of the Tenth Circuit Court of Appeals, dated and entered on October 23, 1981. A petition for rehearing was timely filed and was denied by the court of appeals by order dated and entered on December 8, 1981.

STATUTE INVOLVED

Petitioner contends that the decision of the court of appeals violates the mandate of 28 U.S.C. § 1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Material Facts

The Tenth Circuit Court of Appeals based its opinion on facts it found to be substantially undisputed. Petitioner agrees with that determination and, accordingly, has not requested transmittal of the record in connection with this Petition. The principal issue in the court below was whether Petitioner, Paul R. Kitch, and codefendant Britt Brown[1] owed and breached fiduciary duties to plaintiff minority stockholder in connection with the sale of stock of the Wichita Eagle and Beacon Publishing Company to Ridder Publications, Inc.

At the time of the sale, defendant Brown was a director and president of the corporation and was in charge of operations of the Eagle and Beacon Newspapers, the only daily

[1] All parties to the action in the lower courts are parties to this petition. Judgment in Brown's favor was affirmed by the court of appeals.

newspapers published in Wichita. Brown owned 20,000 of the 60,000 shares of stock outstanding. Plaintiff Victor Delano owned 10,000 shares, plaintiff Victoria Bloom owned 2,000 shares, and plaintiff First National Bank owned 10,000 shares as executor of the estate of Marcellus M. Murdock.[2] The remaining 18,000 shares were held by various other persons. All of the stockholders were descendants of the Murdock family, which had founded the newspaper. The family members had a long history of bitter feuding, particularly between factions allied with Brown and Kitch on one side and with Victor Delano on the other.

Petitioner Kitch was not a stockholder, but was a director of the company (elected by the votes of Brown and those allied with him in the family disputes) and was assistant secretary and outside legal counsel to the corporation.

In the fall of 1972, Brown employed Kitch as his broker and agent to obtain a suitable buyer for his stock at a top price, with instructions to negotiate for an offer acceptable to Brown that would also be made available to all stockholders on an equal basis. For his services, Kitch was authorized to receive a fee of up to 3% of the purchase price of all shares purchased, provided that the fee would have to be paid by the purchaser so that a net, equal price would be offered to all stockholders. Brown was also interested in staying on as publisher of the newspapers under new ownership and authorized Kitch to seek an employment contract for him from potential purchasers.

Over the next several months Kitch engaged in negotiations with potential purchasers. During this time, a group of stockholders, who together with Brown represented controlling shares in the corporation, were advised of the negotiations and agreed to join Brown in a sale of their control block of stock at an acceptable price. In February of 1973, Kitch obtained an attractive offer from Ridder Publi-

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[2] Of the 10,000 shares held by the Bank as executor, all but 2,000 shares that would eventually have been distributed to Victoria Bloom were held for the benefit of persons who have concurred in the stock sale and Kitch's fee and are not parties to this action.

cations, Inc., a large national newspaper publisher, to purchase a minimum of 32,000 up to all 60,000 outstanding shares for $700 per share (a total of $42,000,000 if all shares were tendered).[3] Before the written contract offer was delivered to the plaintiffs, it was executed on behalf of stockholders representing the 32,000 share minimum so that a control sale was assured.

The contract offered to plaintiffs expressly provided for the payment to Kitch by Ridder of a fee of 3% on the fixed portion of the purchase price and required the delivery at closing of an employment contract signed by Brown agreeing to remain employed with the Eagle-Beacon corporation for a period of ten years at a salary of $65,000 per year. Plaintiffs were given ten days to accept or reject the offer. All stockholders except Delano accepted the contract within ten days. On April 30, 1973, a special meeting of the stockholders was held at which all stockholders except Delano voted to repeal the right of first refusal restrictions in the articles of incorporation and then closed their sale to Ridder. Delano commenced this action on March 9, 1973, and withheld acceptance of the offer past the deadline. Ridder subsequently purchased his shares after Delano agreed to pay expenses Ridder had incurred when Delano attempted to block the sale.

Jurisdiction and Proceedings in Lower Courts

This action was brought in federal court under diversity of citizenship jurisdiction, 28 U.S.C. § 1332, by Delano, a resident of Maryland, against all other stockholders of the Eagle-Beacon corporation, Ridder Publications, and Kitch, such defendants being residents of various states other than Maryland. Delano first unsuccessfully sought to enjoin the sale. The action then proceeded to trial on claims for damages based on alleged breaches of fiduciary duty by Kitch

[3] The $700 per share price was based on an "earn-out" provision whereby the stockholders received an additional payment based on earnings of the corporation after the sale. Kitch's fee was 3% of the fixed price of $675 per share before the addition of the "earn-out".

and Brown, with Bloom and First National Bank joining as plaintiffs by cross-claim as to damages only.

The first trial resulted in verdicts for defendants on all claims. On appeal, the Tenth Circuit Court of Appeals reversed the judgments on grounds of allegedly improper jury instructions. *Delano v. Kitch*, 542 F.2d 550, *opinion on motion for clarification*, 554 F.2d 1004 (10th Cir. 1976) (hereinafter referred to as "*Delano I*").

The second trial resulted in verdicts against Kitch on plaintiffs' claim for that portion of his fee allocable to the sale of their 22,000 shares (a total of $447,500). Delano also was awarded punitive damages of $202,500. A jury verdict was rendered in favor of Brown on the claim that he breached his fiduciary duty by accepting the employment contract. The jury also found that plaintiffs' stock could not have been sold for more than it was, rejecting plaintiffs' claim that, but for the alleged breaches of fiduciary duty in negotiating for a fee to Kitch and an employment contract for Brown, a potential purchaser would have paid more for their stock.

A second appeal was taken to the Tenth Circuit Court of Appeals, principally on the ground that following *Delano I* the Kansas appellate court had announced for the first time the controlling state law, which was directly contrary to *Delano I*. In *Ritchie v. McGrath*, 1 Kan. App. 2d 481, 571 P.2d 17, *petition for review denied*, 222 Kan. 749 (1977), the court rejected the so-called "equal opportunity doctrine" of control stock sales and held that majority shareholders, notwithstanding their capacity as officers and directors, are entitled to sell their control shares at a premium price with no fiduciary duty to inform minority shareholders of the sale negotiations or to secure an offer for their benefit to buy their shares at any price, let alone the same price. Accordingly, the majority stockholders in this case had an absolute right to negotiate a sale on terms suitable to them, including the provision for payment of a fee to Kitch, without any duty to the minority stockholders whatsoever.

The court of appeals agreed with this contention as to defendant Brown only, stating:

> While Brown had substantial stock ownership and is entitled to the benefit of *Ritchie's* control sales doctrine, Kitch owned no stock; *Ritchie* therefore does not apply directly to Kitch. (663 F.2d at 998)

The judgment in favor of defendant Brown was affirmed and the judgments against Kitch were allowed to stand.

Kitch immediately petitioned for rehearing, showing the court there was no precedent anywhere for its freshly propounded rule that there are two different sets of fiduciary duties, one for corporate directors who are stockholders and another for directors who are not stockholders. In connection with the petition for rehearing, Kitch requested certification of the controlling question of state law to the Kansas Supreme Court under the Uniform Certification of Questions of Law Act, K.S.A. 60-3201, *et seq.* (Supp. 1981), which was not adopted in Kansas until after this appeal was commenced. Without comment or explanation, the court of appeals denied Kitch's petition for rehearing and his motion for certification of the question of state law by order dated December 8, 1981.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM ITS DUTY TO APPLY STATE LAW AS THE RULE OF DECISION UNDER *ERIE R. CO. v. TOMPKINS*, AS TO CALL FOR THIS COURT'S EXERCISE OF THE POWER OF SUPERVISION.

Since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938), federal courts have been required to apply state law as the rule of decision in diversity of citizenship cases. They are not free to fashion their own rules in derogation of state law. In the absence of a federal question or overriding federal policy, there is no law but state law, and it must be applied. *Hanna v. Plummer*, 380 U.S., 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965). If Petitioner establishes that the court of appeals refused to follow the state law, Kansas law in this instance, he should be entitled to relief in this Court.

A. Controlling State Law Requires Judgment for Kitch.

The state law question presented is whether Petitioner could, without violating any fiduciary duty owed by him as a corporate officer and director, undertake to represent a group of controlling shareholders in negotiating an offer to purchase their stock in consideration of a fee for his services authorized by the controlling shareholders. The Kansas case of *Ritchie v. McGrath*, 1 Kan. App. 2d 581, 571 P.2d 17 (1977), is in point and controlling. It holds there are no fiduciary duties imposed on officers, directors, or controlling shareholders to inform minority shareholders of the formation of a controlling block of shares or of negotiations for a sale of controlling shares, and they have no duty to obtain an opportunity for the minority shareholders to sell their shares to the proposed purchaser on *any* terms, let alone the *same*, terms that were accepted by the majority shareholders.

In *Ritchie* the stock of a banking corporation was held by well-to-do investors engaged in other businesses. Defendant McGrath was president, chief executive officer, and a director of the corporation, but owned only nominal shares of stock. When some stockholders decided to pool their existing shares and purchase sufficient additional shares to form a marketable controlling block of stock, they wanted the bank president on their side. They approached McGrath with the suggestion that he join their group and that he buy more stock to put in the pool. His subsequent stock purchases raised his holdings above the nominal level, but he still owned only 5% of the outstanding stock. 1 Kan. App. 2d at 483, 571 P.2d at 19-20.

With McGrath acting as negotiator, the majority group sold controlling stock for $80 per share and paid McGrath a fee for his services of $1.00 per share sold. McGrath was also retained by the purchaser as president of the bank at an increased salary. None of the plaintiff minority shareholders was told of the formation of the control group or of the sale negotiations, and, when they questioned McGrath, he refused to disclose the amount paid for the shares or for his

commission. The purchaser later acquired the minority shares for $50.20 per share, approximately 40% less than was paid to the majority stockholders. 1 Kan. App. 2d at 484-85, 571 P.2d at 20-21.

Based on these facts the Kansas court held that "defendants violated no fiduciary duty by acquiring control or entering into a pooling agreement or in failing to disclose such facts to plaintiffs" (1 Kan. App. 2d at 488-89, 571 P.2d at 22-23), and, when "the opportunity to sell stock ... was intercepted by McGrath" (president and director of the corporation), he "violated no duty in not disclosing to the plaintiffs the offer to purchase a majority of the stock". 1 Kan. App. 2d at 489-90, 571 P.2d at 23.

Ritchie establishes that neither officers and directors nor controlling stockholders have any fiduciary duty to include minority stockholders in a control stock sale on any terms. Plaintiff minority stockholders in the suit at bar had no right to obtain even the *same* price received by the majority shareholders, and certainly had no right to demand the same price *plus* part of the commission authorized by the majority stockholders to be paid to Kitch. The majority stockholders were free under controlling Kansas law to sell their stock on terms chosen by them, including compensation to Kitch. The plaintiff minority stockholders received *more* than they were entitled to when they were extended an offer to sell on the same terms offered to majority stockholders.

B. The Court of Appeals Refused to Follow Controlling State Law.

In reported court of appeals' first opinion in this case, the court based its decision on alleged facts and law bearing no resemblance to the second decision from which certiorari is sought. The court stated in *Delano I* that Kitch and Brown had conspired to conduct a "secret" sale of "the entire corporation" over plaintiffs' objections and had "coerced" plaintiffs into selling by giving them only ten days in which to accept or reject Ridder's offer to purchase their shares. The court said "it could be presumed" that someone would have paid more for plaintiffs' stock but for the demands of Brown

for an employment contract and of Kitch for a fee for his services. The court held that Kitch and Brown owed fiduciary duties under these facts because there had been a "sale of the entire corporation." *Delano I*, 542 F.2d at 552-53.

On the second appeal, the subsequent decision in *Ritchie* and the correct facts were cited to the court. In the second opinion, the court acknowledged that plaintiffs merely received an *offer* to buy their stock, which they were entirely free to accept or reject. Since *Ritchie* established that the negotiations rightfully could be conducted in "secret" without including minority shareholders, and since minority stockholders rightfully could be left out altogether, the "secrecy," "coercion" and "sale of the entire corporation" theories of the first opinion were eviscerated. The jury had found that plaintiffs received the maximum value for their stock so that the "presumption" plaintiffs had suffered some actual or potential detriment also was out of the case.

The court of appeals conceded that *Ritchie* was controlling in this case as to defendant Brown, who formed the control group that authorized Kitch to act, and it affirmed the judgment in Brown's favor. But the court distinguished the rule of *Ritchie* as to Kitch on the following ground:

> While Brown had substantial stock ownership and is entitled to the benefit of *Ritchie*'s control sales doctrines, Kitch owned no stock; *Ritchie* therefore does not apply directly to Kitch. (663 F.2d at 998)

In the absence of the "benefit" of *Ritchie*, the court found Kitch had violated fiduciary duties under two alternative theories of the supposed duty. First, the court indicated that Kitch could not "serve one group of stockholders against another" unless the services "involved no conflict with the interests of the corporation or its shareholders" (663 F.2d at 998). Second, the court found there was the "additional element that Kitch served his own interests against the will of plaintiffs" by accepting a "secret commission"[4] from a third

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[4] The court of appeals cites no evidence in support of its finding that the commission was "secret", and there is none. The commission was

party, Ridder Publications.

The *Ritchie* control stock sale doctrine is not simply a holding that majority stockholders who happen to be officers and directors are exempted from duties that otherwise apply to such fiduciaries. It is a rule of principle that minority stockholders have no right to participate in a control stock sale arranged by the control group. By serving the interest of the majority group and his own interest as well, Kitch was not violating any right or interest of minority stockholders recognized under Kansas law. There can be no breach of fiduciary duty in failing, for any reason, to protect a nonexistent right.

The *Delano II* decision directly conflicts with *Ritchie* by holding, in effect, that there is a "better than equal opportunity" rule applicable only against small stockholder and nonstockholder directors, when *Ritchie* makes it clear there is no equal opportunity rule of any type at any time. *Delano II* interferes with majority stockholders' rights by permitting the plaintiff minority stockholders to siphon off to themselves an additional portion of the premium value of controlling shares that *Ritchie* plainly holds may be claimed by the majority shareholders, and, if they so desire, paid to their agent who negotiates the sale for their benefit.

Moreover, *Ritchie* expressly states at 1 Kan. App. 2d 491, 571 P.2d 24:

> We conclude that there was not a breach of fiduciary duty of the defendants as officers, directors *or* dominant shareholders . . . . (emphasis added)

By its own terms *Ritchie* is not limited in its effect to persons who are officers and directors *and* substantial stockholders. By rewriting the holding of the Kansas court in the conjunc-

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openly and fully disclosed, as to both its existence and exact amount, in the written contract offered to plaintiffs. All plaintiffs were fully aware of the commission and this lawsuit had been commenced before the ten days for accepting or rejecting the offer had expired. Because of the absence of any such facts, the "secret commission" charge has never been, and is not now, an issue in this case.

tive, the court of appeals has plainly violated the first commandment of the federal judicial system — that federal courts shall not create their own common law on matters within the states' jurisdiction.

C. The Court of Appeals May not Avoid the Rule of Erie R. Co. v. Tompkins.

The cases uniformly hold that a federal court is bound by a decision of an intermediate state court of statewide jurisdiction unless it is convinced that the decision would not be applied by the highest court of the state. *Gooding v. Wilson*, 405 U.S. 525, n.3, 518, 92 S. Ct. 1103, L. Ed. 2d 408 (1972); *citing Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 76 S. Ct. 273, 100 L. Ed. 197; and *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 61 S. Ct. 176, 85 L. Ed. 109 (1940). In the instant case the Court of Appeals treated *Ritchie v. McGrath* as an aberrant case that should be confined to its own facts where the officers and directors participating in the control sale were also substantial stockholders.

Contrary to the court of appeals' conclusion, the *Ritchie* control stock sale doctrine represents the overwhelming general rule that corporate stock is personal, not communal, property in which officers and directors may deal for profit. In a case arising in Kansas, the Tenth Circuit had previously so held. *McDaniel v. Painter*, 418 F.2d 545, 548-49 (10th Cir. 1969). In *Ritchie*, the Kansas court examined numerous cases and law review articles and noted that *Brown v. Halbert*, 271 Cal. App. 2d 252, 76 Cal. Rptr. 781 (1969) is the only case in the country arguably holding that minority stockholders have some rights with respect to participation in a control stock sale.

The rights of minority stockholders in control stock sales have long been a subject of heated debate, stemming from *Perlman v. Feldman*, 219 F.2d 173 (2d Cir. 1955), *cert. denied* 349 U.S. 952, 75 S. Ct. 880, 99 L.Ed. 1277. *See* Berle, *The Price of Power: Sale of Corporate Control*, 50 Cornell L.Q. 638 (1965); and Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 Harv. L. Rev. 505 (1965)

(cited and rejected in *Ritchie v. McGrath*). The debate has centered on whether "control" is a corporate asset, the sale of which may impose *additional duties on controlling stockholders*, not otherwise imposed on officers and directors, to account to minority shareholders for the premium value of controlling shares. No one (other than the Tenth Circuit in *Delano II*) has ever suggested that the ownership of substantial stock imposes *lesser* duties or provides an exemption from duties that otherwise apply to officers and directors. No one (other than the Tenth Circuit in *Delano II*) has ever suggested that minority stockholders should be entitled to anything *better* than the equal treatment they were afforded in the present case. The Tenth Circuit's holding is contrary to all prior law and is admittedly *sui generis*:

> No Kansas court has decided a case precisely like this one before us, and neither has any other court so far as we can ascertain. (663 F.2d at 997)

One of the stated purposes of *Erie R. Co. v. Tompkins*, 304 U.S. at 78, was to prevent federal courts from "brushing aside the law of a State in conflict with their views." This is precisely what has happened in *Delano II*. Having decided in *Delano I* that Kitch should lose, the court conveniently "brushed aside" the intervening state court decision in *Ritchie* in order to conform to its view of the proper result in the present case.

The rule of *Delano II* that there is one standard of duty for stockholder directors and another standard for nonstockholder directors is a classic distinction without a difference. If such a distinction is allowed to stand, the *Erie* holding is rendered meaningless. This important rule of constitutional federalism must be protected, and this is the appropriate case for the Supreme Court to define and enforce the rule.

The Court of Appeals cited no authority for its conclusion that the rule of *Ritchie* would or could be limited in its application to directors and officers who are substantial stockholders. (See *Delano II*, 663 F.2d at 998.) Nor does it state *any* grounds, let alone compelling ones, for applying a

different rule to nonstockholder directors.[5]

Under the existing decision, Petitioner stands condemned to pay judgments totalling, with interest and costs, over $800,000 in the face of an affirmed jury verdict that plaintiffs received the maximum price for their shares and have suffered no actual damages whatsoever, but have in fact shared in a payment for the control value of the corporation to which they had no right. The sole "wrong" committed in this case is that plaintiffs were magnanimously extended an offer to sell on the same terms as the majority when they unquestionably could have been frozen out at a low price. This is an outrageous result based on an unprincipled decision.[6]

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[5] There can be no question as to the fairness of the present transaction. The cases take judicial notice that controlling shares of a corporation have a premium value and hold that the premium belongs to the owners of controlling shares. *E.g.*, *Ritchie v. McGrath*, 571 P.2d at 23; *McDaniel v. Painter*, 418 F.2d at 548. If minority shareholders are magnanimously allowed to share in that premium, as they were in this case, they will always benefit. Any payment of expenses, such as a brokerage commission, comes out of the premium value of majority shares. Only if there were an "equal opportunity" rule could minority shareholders legitimately claim that a part of the commission was attributable to the value of their shares and should belong to them. Under the present conflict between *Delano II* and *Ritchie*, majority shareholders have two choices — freezing out minority stockholders at a low price or letting them in at a potentially better price (without sharing expenses authorized by the majority) — and given these choices, it is clear that *Delano II* is a pro-freeze-out, anti-minority stockholder rule.

Another grossly unfair aspect of *Delano II* is that a substantial stockholder could retain millions of dollars in premium for his control shares in a freeze-out sale, but if a nonstockholder director assisted in the sale, even if motivated only by family loyalty to or friendship for the majority group, he could be liable for breaching a supposed fiduciary duty by serving "one group of stockholders against another".

[6] The lack of principle in the Tenth Circuit's opinion is further demonstrated by its refusal to obey the most basic tenets of appellate review concerning the distinction between review of questions of law and questions of fact. *See, e.g.*, *Reys v. Hoffman*, 580 F.2d 393 (10th Cir. 1978). In its discussion of Kitch's contention that he is entitled to judgment as a matter of law, the court upheld the verdict on the ground that the issue was a fact

II. THE COURT OF APPEALS ABUSED ITS DISCRETION IN REFUSING TO CERTIFY THE CONTROLLING QUESTION OF STATE LAW TO THE KANSAS SUPREME COURT.

The court of appeals, having refused to apply the only relevant state court decision and having found there was no case in point in Kansas or anywhere else, nevertheless proceeded to announce its own unprecedented rule for deciding the case. Upon receiving the decision, petitioner immediately sought rehearing and requested the court to certify the controlling question to the Kansas Supreme Court under the Uniform Certification of Questions of State Law Act, K.S.A. 60-3201, *et seq.* (Supp. 1981), which was not adopted in Kansas until several months after the instant appeal was filed. The court of appeals denied the motion for certification without comment or statement of reasons.

Certification of questions of state law has been an established practice in federal courts for several years. The Supreme Court highly commended the certification procedure in *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91, 94 S. Ct. 1741, 40 L. Ed. 2d 215, 220 (1974). Although the Court remanded the *Lehman Brothers* case for purposes of invoking the certification procedure, the procedure was not made

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question resolved by the jury, concluding at 663 F.2d 998 that: "The *jury could find* that Kitch acted for his own pecuniary interest in procurring a fee from Ridder ...." (emphasis added). However, when discussing Kitch's contention that he was denied a fair trial on the facts (based on the trial court's express finding that he did not), the court said: "As we have analyzed Kitch's legal duty to the minority shareholders, *the issue is primarily legal* .... There is no essential dispute on the other facts relevant to his liability to repay the fee .... Since we have determined *Ritchie* does not shield one in Kitch's position, the [trial] judge's comments about fairness are not relevant. No new trial on this issue is necessary." (663 F.2d at 1000).

This intellectually dishonest double standard of review denied Kitch all rights to a fair determination in any court. He was held not entitled to a fair trial on the ground that he was not entitled to *any* trial on the facts. Yet he was denied a proper appellate review of the applicable law on the ground of deferring to the jury's determination of fact issues. This alone is sufficient to require invocation of this Court's power of supervision.

obligatory. Instead, the Court stated: "Its use in a given case rests in the sound discretion of the federal court.

The substantive factors considered in determining whether to certify a question of state law to a state court, including the novelty, difficulty, and widespread application of the state law to be determined, strongly support this case as a candidate for certification. *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976). *See Elkins v. Moreno*, 434 U.S. 647, 98 S. Ct. 1338, 55 L. Ed. 2d 614, *supplemented*, 441 U.S. 458, 99 S. Ct. 2044, 60 L.Ed.2d 354 (1978). The question involved here is not the interpretation of some obscure statute that affects only the practice of taxidermy within city limits or some other law of limited interest. The principles of law posed by this case involve a recurring question, affecting numerous corporate officers, directors, and stockholders in Kansas and elsewhere.

In view of the significance of the question and in view of the Tenth Circuit's holding that there is no controlling state authority, there appears to be no reason for not certifying the questions presented to the Kansas Supreme Court, with the possible exception of potential delay. (*See* the concurring opinion of Justice Rehnquist in *Lehman Brothers*, 416 U.S. at 392-93, 40 L. Ed. 2d at 221.) However, time is merely one factor in the exercise of the Court's discretion and not a particularly important one. In *Lehman Brothers* the case had been through both the district and appellate courts before the Supreme Court remanded to the court of appeals for a determination of whether a question should be certified. In *Crutsinger v. Mead Foods, Inc.*, 546 F.2d 328 (10th Cir. 1976), the Tenth Circuit itself certified a question to the Oklahoma Supreme Court, apparently on its own motion, as there was no indication the district court had been requested to do so.

The Kansas Supreme Court gives certified questions priority on its docket. For example, in *Albertson v. Volkswagen Aktiengesellschaft*, 634 P.2d 1127 (Kan. 1981), a certified question was briefed, argued and decided within approximately five months. This demonstrates that the principal concern about certification procedures at this stage —

additional delay — is not significant in Kansas. *Compare State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976) (one year usually required for state court decision in that Circuit). In the context of this case, the delay involved in obtaining a fair determination of Kansas law through the certification of a question is inconsequential.

The refusal of the court of appeals to even consider the certification procedure in the present case is much more egregious than the refusal to certify in *Lehman Brothers*. In *Lehman Brothers* the court of appeals had at least some basis for its decision under the case law of another state. In the instant case, the Tenth Circuit, in making the best argument it could for its position, found there was no case in point in *any* jurisdiction. Moreover, the court had to reach that point by arbitrarily distinguishing a Kansas case, that on its face requires a contrary judgment. If it was improper to deny certification in *Lehman Brothers v. Schein*, it was *a fortiori* improper to deny certification in this case.

The holding of *Delano II* announces an entirely new rule of fiduciary duty for Kansas and the entire United States in the highly controversial area of corporate control sales, that rule being that the control sales doctrine does not apply to officers and directors who own no stock in the corporation. The court of appeals in effect overruled the Kansas case of *Ritchie v. McGrath* as to nonstockholder officers and directors, holding that they alone may be held liable for failing to include minority stockholders in a control sale on terms acceptable to and dictated by the minority stockholders.

Prior to the announcement of the Tenth Circuit's decision, petitioner was entitled to rely on *Ritchie* and to present its holding to the court. By distinguishing *Ritchie*, the Court of Appeals created the state law vacuum. Until its ruling was made, petitioner could not possibly have anticipated or framed as an issue the question of whether there are different fiduciary duties for stockholder and nonstockholder officers and directors. There was no opportunity and no need to certify a question before *Delano II*. Kitch is entitled to find out whether *Ritchie* does or does not apply to him.

The holding of the Tenth Circuit, if not a blunt violation of *Erie R. Co. v. Tompkins*, is at least such a departure from existing precedent that it should not be promulgated without first ascertaining whether the Kansas Supreme Court would accede in the newly announced rule. In the absence of some compelling reason to insist on interdicting the sate court's prerogative to formulate state law, the court of appeals should be required to invoke the readily available certification procedure. As stated above, the court of appeals gave no reason at all for its arbitrary refusal to do so.

As a result of the court of appeals' ruling, petitioner stands subject to federal court judgments totalling over $800,000 (with interest and costs) when he would be entitled to summary judgment in state court. This is inconsistent with the cooperative federalism expressed by *Lehman Brothers v. Schein*. This Court should exercise its supervisory powers and direct the court of appeals to ascertain the state law by certification of the question to the Kansas Supreme Court.

Respectfully submitted,

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Appendix

United States Court of Appeals

TENTH CIRCUIT

VICTOR DELANO, VICTORIA BLOOM, and FIRST NATIONAL BANK IN WICHITA, executor of the Estate of Marcellus M. Murdock,	)	Appendix A Filed October 23, 1981
Plaintiffs-Appellees, Cross-Appellants,	)	Nos. 79-1065 79-1066
v.	)	79-1067
PAUL R. KITCH, Defendant-Appellant, Cross-Appellee,	)	79-1068
and	)	
HARRY B. BROWN, Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D. C. No. W-5096)

James D. Oliver and John F. Eberhardt (Robert C. Foulston with them on the brief) of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, for Defendant-Appellant and Cross-Appellee Paul R. Kitch.

John M. Mason (Paul Martin Wolff with him on the brief) of Williams & Connolly, Washington, D. C.; Paul B. Swartz of Martin, Pringle, Fair, Davis and Oliver, Wichita, Kansas, of

counsel) for Plaintiff-Appellee and Cross-Appellant Victor Delano.

Ronald K. Badger, Wichita, Kansas, for Plaintiff-Appellee and Cross-Appellant Victoria Bloom.

Charles W. Harris of Curfman, Harris & Weigand, Wichita, Kansas, (Jack Scott McInteer, Wichita, Kansas, with him on the brief) for Plaintiff-Appellee and Cross-Appellant First National Bank in Wichita.

John M. Kobayashi (Donald C. McKinlay with him on the brief) of Holme, Roberts & Owen, Denver, Colorado, for Defendant-Appellee Harry Britton Brown, Jr.

Before DOYLE, McKAY and LOGAN, Circuit Judges.

LOGAN, Circuit Judge

These consolidated appeals arise out of a diversity action three shareholders of the Wichita Eagle and Beacon Publishing Company brought for monetary recovery from Paul R. Kitch, a director, officer, and lawyer for the corporation, and Harry Britton Brown, Jr., a director, officer, and shareholder, for breach of fiduciary duty in a transaction involving the sale of all of the corporation's stock to Ridder Publications, Inc. (Ridder). After trial a jury awarded the plaintiffs recovery and punitive damages against Kitch and held Brown jointly liable for some of the award against Kitch. The trial court granted a new trial on the issues of punitive damages and Brown's joint liability. Finding no just reason for delay on the other jury determinations, the trial court entered judgments pursuant to Fed. R. Civ. P. 54(b) permitting appeals by Kitch and cross-appeals by plaintiffs Victor Delano, Victoria Bloom, and the First National Bank in Wichita as executor of Marcellus M. Murdock's estate.

The principal issue in these appeals is whether Kitch owed and breached a fiduciary duty to the suing minority share-

holders. Other issues concern the law of the case, alleged trial error, prejudgment interest, and whether Ridder's contract with Brown assuring his continued employment as an officer of the publishing company breached Brown's fiduciary duty to the shareholders.

The essential facts are largely undisputed. The Wichita Eagle and Beacon Publishing Company publishes the only daily newspaper in Wichita, Kansas. Colonel Marshall Murdock founded the newspaper in 1872 and ownership remained in his family until the sale to Ridder. At the time of the sale, defendant Brown was a director and president of the company and was in charge of daily operations. He owned 20,000 of the 60,000 outstanding issued shares, and the following parties owned the remainder of the stock: plaintiff Delano, 10,000 shares; plaintiff First National Bank, 10,000 shares held as executor of Marcellus M. Murdock's estate; plaintiff Victoria Bloom, 2,000 shares; Katherine Henderson, 10,000 shares; and six other descendants of Murdock, 8,000 shares in various amounts. Defendant Kitch was neither a Murdock family member nor a shareholder, but he was a director, the assistant secretary, and the principal lawyer for the corporation.

In conversations that did not include any of the plaintiffs, Brown and Kitch discussed finding a buyer for the stock of the corporation. Brown apparently believed Kitch possessed special bargaining skills and asked Kitch to negotiate a sale. Kitch was willing to find a purchaser, but demanded the right to require the purchaser to pay him a 3% "finder's fee." Brown agreed. Kitch then sought a buyer willing to pay cash for all of the stock and willing to employ Brown for ten years at $100,000 per year. During his search and until he successfully negotiated a sale, Kitch continued to serve as director, assistant secretary, and legal counsel to the corporation.

Kitch obtained an attractive offer from Ridder: all of the corporate stock for $42,000,000,[1] or any amount above

[1] Ridder offered $40,500,000 with an additional $1,500,000 if earnings reached a certain level by the end of the newspaper's fiscal year. The newspaper met the earnings requirement.

32,000 shares at a pro rata price. The offer included for Kitch a 3% commission on all shares tendered,[2] and for Brown a ten-year employment contract at $65,000 per year. By the time Ridder executed the contract, several shareholders other than the plaintiffs had authorized Kitch to sell their stock; as a result, Brown and Kitch could sell Ridder a majority of the stock. When plaintiffs heard about the offer and discovered that a majority of the shareholders intended to sell, each plaintiff sold his or her stock.[3]

Plaintiffs then brought suit against Kitch and Brown for breach of fiduciary duty. The jury awarded each plaintiff the commission Kitch received for the sale of that plaintiff's stock: $202,500 to Delano, $202,500 to First National Bank, and $40,500 to Bloom. The jury determined that neither the bank nor Bloom could recover damages from Kitch or Brown based upon Brown's employment contract. The jury also found that Kitch could not have obtained a higher purchase price for the newspaper.

In ruling on post-trial motions, the court vacated the jury's decisions to award Delano $202,500 against Kitch as punitive damages, and to award Bloom $40,500 against Brown as joint liability for Kitch's finder's fee.[4] The trial court ordered a new trial on the claims of punitive damages and joint liability. The court refused to award prejudgment interest and ordered each party to bear his or her own costs.

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[2] Kitch's commission was to be 3% based on a purchase price of $40,500,000. *See* note 1 *supra*.

[3] Delano, attempting to negotiate another sale, withheld his acceptance of the offer past Ridder's deadline. Ridder subsequently purchased his shares after Delano agreed to pay expenses Ridder had incurred when Delano attempted to block the sale.

[4] All plaintiffs except Bloom settled with Brown.

I

This is the second time this case comes to our Court after a full trial.[5] In the first trial a jury found for defendants Kitch and Brown. We reversed and remanded for a new trial because of errors in the instructions on Kansas law as it applies to the fiduciary duties of directors and officers. Delano v. Kitch, 542 F.2d 550 (Delano I), *op. on motion for clarification*, 554 F.2d 1004 (10th Cir. 1976). We there reviewed the many Kansas cases holding directors and officers to a very strict duty of loyalty both to the corporation and to its shareholders and concluded that if the Kansas Supreme Court were to decide the issue, it would find that Kitch and Brown owed fiduciary duties to minority shareholders.

After our opinion in *Delano I* and before the trial on remand, the Kansas Court of Appeals decided *Ritchie v. McGrath*, 1 Kan. App.2d 481, 571 P.2d 17 (1977). Although affirming that directors, officers, and majority shareholders owe strict fiduciary duties, the Kansas Court of Appeals held that majority shareholders do not breach that duty by selling their stock and concomitant control of the corporation, as long as the majority shareholders do not dominate, interfere with, or mislead other shareholders in exercising their rights to sell (hereinafter the control sales doctrine). *Id.* at 23. Control of a corporation is not a corporate asset, and the majority shareholders are not required to share with the minority shareholders any premium received for control. *Id.* at 25. The court qualified its holding by noting that the sellers would have violated their fiduciary duties if they knew or should have known the purchasers were looters or were likely to mismanage the corporation, or if the sale involved fraud, misuse of confidential information, siphon-

[5] Even before the first trial, we dealt with this case when Delano sought to enjoin a meeting of stockholders called to vote on whether to eliminate a right of first refusal provision in the Articles of Incorporation. Elimination of the provision was necessary to clear an obstacle to the Ridder sale. The district court concluded that a vote of shareholders could remove the provision and denied the injunction. Delano appealed, and we issued a temporary order restraining corporate proceedings pending a hearing. After a special hearing, we lifted the temporary injunction. *See* Delano v. Kitch, 554 F.2d 1004, 1005 (10th Cir. 1976).

ing off of a business advantage belonging to the corporation or the shareholders in common, or wrongful appropriation of corporate assets. *Id.* at 22. *See also* Harmon v. Willburn, 520 F.2d 1333, 1334 (10th Cir. 1975); McDaniel v. Painter, 418 F.2d 545, 547-48 (10th Cir. 1969). *Ritchie* did not disagree with *Delano I* but instead found it did not address the duty owed by majority stockholders.[6]

During and after the retrial we ordered in *Delano I*, the trial court expressed concern that the law of the case we set forth in *Delano I* unduly restricted the retrial. The court concluded its posttrial order with the following:

> "In trying this case a second time, the court attempted to conscientiously comply in every material respect with the circuit court opinion rendered as to the first trial of this case. *See Delano v. Kitch*, 542 F.2d 550 (10th Cir. 1976). In so doing, this court retains substantial misgivings as to whether a fair trial was accomplished.
>
> "Issues of the utmost significance to the just resolution of this case, including whether the acquiescence of the plaintiff shareholders to the newspaper sale resulted from economic coercion and whether such acquiescence, if uncoerced, constituted ratification and barred recovery on plaintiffs' part, were decided on appeal as a matter of law on the basis of the first trial's record. The evidence at retrial was substantial and conflicting on these matters and, in the estimation of this court, raised issues of a type appropriate for jury disposition.

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[6] *Ritchie* made the following statement concerning *Delano I*:

"In addition, where an officer or director negotiates a sale of stock where incumbent directors and officers are to resign so to effect a sale of the entire corporation, acts of the directors or officers compelling minority shareholders to sell their shares on terms which personally benefit the directors or officers, may be breaches of fiduciary duty. See *Delano v. Kitch*, 542 F.2d 550 (10th Cir. 1976)"

571 P.2d at 22.

> "Significant Kansas law was recorded in the decision of *Ritchie v. McGrath*, 571 P.2d 17 (Kan. App. 1977), rendered subsequent to *Delano v. Kitch*, *supra*, yet its impact was restricted at retrial by the specific law of this case as enunciated in the circuit court's opinion. *Delano v. Kitch*, *supra*.
>
> "The court instructed the jury as it felt required to do in light of the mandate in this case, and if the verdicts rendered on retrial are appealed, the circuit court is invited to review whether the legitimate purview of the jury was to some extent preempted."

The trial court misunderstood the effect *Delano I* should have upon the issues before the court on remand. Normally, in conducting the retrial a trial court should follow rulings of law the appellate court previously made. However, the law of the case doctrine is not so rigid as the rule of res judicata, Southern Ry. v. Clift, 260 U.S. 316, 319 (1922), and must yield to a controlling decision between the date of the first ruling and the retrial. In this diversity case Kansas substantive law applies. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). In *Chicago, Rock Island & Pac. R.R. v. Hugh Breeding, Inc.*, 247 F.2d 217 (10th Cir.), *cert. dismissed*, 355 U.S. 880 (1957), after a federal court decided an issue of Kansas substantive law, the Kansas Supreme Court made a contrary decision on the same issue. Under such circumstances, we said, "it is the duty of the Federal court that still has jurisdiction of the case to conform its decision and judgment to the latest decision of the supreme court of the state." *Id.* at 223. In the absence of a state supreme court ruling, a federal court must follow an intermediate state court decision unless other authority convinces the federal court that the state supreme court would decide otherwise. *E.g.*, West v. American Tel. & Tel. Co., 311 U.S. 223, 237 (1940). Therefore, on retrial the court should have considered *Ritchie*'s application to this case. We may, indeed must, reassess Kansas law in light of *Ritchie* to determine whether, pursuant to our remand order in *Delano I*, the trial court gave erroneous instructions that prejudiced the defendants.

II

Kitch contends that the control sales doctrine of *Ritchie* protected Brown; as representative of a group of Eagle-Beacon stockholders controlling a majority of the shares, Brown could arrange for the sale of the corporation's controlling interest without breaching any fiduciary duty to minority shareholders. Kitch then asserts that the doctrine protects him as well because he was acting as Brown's agent. Moreover, Kitch argues, not only did he breach no fiduciary duty to the plaintiff minority shareholders, but his activities benefitted them by securing for them the right to tender their stock on the same terms as the majority shareholders. Kitch argues that the minority shareholders could have avoided contributing to Kitch's finder's fee merely by declining to sell their stock, and therefore, by tendering their stock with knowledge of his fee arrangement, they ratified his actions and foreclosed any right to claim injury. On this basis Kitch asserts he is entitled to judgment notwithstanding the verdict.

We recognize that in *Ritchie* Kansas adopted the control sales doctrine. But we do not believe that doctrine applies to Kitch. We think that Kansas courts would find Kitch owed a fiduciary duty to the plaintiff shareholders, and that *Delano I* correctly states Kansas law as it applies to Kitch.

Kansas imposes a strict fiduciary duty of loyalty upon directors and officers. For example, unlike some states, Kansas requires directors and officers to disclose any information affecting the value of stock before buying stock from or selling stock to a current shareholder. Blazer v. Black, 196 F.2d 139, 146 (10th Cir. 1952); Blakesley v. Johnson, 227 Kan. 495, 608 P.2d 908, 914 (1980); Sampson v. Hunt, 222 Kan. 268, 564 P.2d 489, 492 (1977); Hotchkiss v. Fischer, 136 Kan. 530, 16 P.2d 531, 534-35 (1932); Stewart v. Harris, 69 Kan. 498, 77 P. 277, 281 (1904). Although the Kansas legislature adopted a new corporate code in 1972, we find no indication that the legislature intended to change the law concerning directors' and officers' duty of loyalty to shareholders. Nor do we find any change in the decisions of the Kansas Supreme Court. For example, that court recently

reaffirmed the requirement of disclosure in a direct transaction between a shareholder and a fiduciary. Blakesley v. Johnson, 608 P.2d at 914.

Kansas has long recognized that a director has a duty of loyalty to stockholders as well as to the corporation. *See, e.g.*, Newton v. Hornblower, 224 Kan. 506, 582 P.2d 1136, 1143-44 (1978); Stewart v. Harris, 69 Kan. 498, 77 P. 277, 279 (1904); Mulvane v. O'Brien, 58 Kan. 463, 49 P. 607, 612 (1897); Sargent v. Kansas Midland R. Co., 48 Kan. 672, 29 P. 1063, 1069 (1892). In *Stewart* the Kansas Supreme Court quoted approvingly from J. Pomeroy, *Equity Jurisprudence*, as follows:

> "[T]he directors and managing officers occupy the position of quasi trustees towards the stockholders alone, and not at all towards the corporation, with respect to their shares of stock. Since the stockholders own these shares, and since the value thereof and all their rights connected therewith are affected by the conduct of the directors, a trust relation plainly exists between the stockholders and the directors, which is concerned with and confined to the shares of stock held by the stockholders. From it arise the fiduciary duties of the directors towards the stockholders in dealings which may affect the stock and the rights of the stockholders therein, and their equitable remedies for a violation of those duties."

69 Kan. at 504, 77 P. at 279-80. The court further relied upon *Oliver v. Oliver*, 118 Ga. 362, 45 S.E. 232 (1903). In *Oliver* the Georgia Supreme Court held that a director owes a fiduciary duty to the individual shareholders, stating that:

> "It is conceded that the position which the director occupies prevents him from making personal gains at the expense of the company, or of the whole body of stockholders. But the rule that he is not trustee for the individual shareholders inevitably leads to the conclusion that, while a director is bound to serve stockholders en masse, he may antagonize them one by one; that he is an officer of the company, but may be the foe of each

> private in the ranks. When it is admitted, as it must be, both from the very nature of his duty and from the rulings of nearly all the cases, that he is trustee for the shareholder, how is it possible, in principle, to draw the line, and say that, while trustee for some purposes, he is not for others immediately connected therewith?"

Id. at 235 *quoted in Stewart*, 69 Kan. at 506-07, 77 P. at 280.

The Kansas cases have variously stated that directors and officers owe "the highest measure of duty, and the most scrupulous good faith," Thomas v. Sweet, 37 Kan. 183, 207, 14 P. 545, 557 (1887); *accord*, Arkansas Valley Agricultural Soc'y v. Eichholtz, 45 Kan. 164, 167, 25 P. 613, 614 (1891); that they may not "secure a personal advantage," Peckham v. Lane, 81 Kan. 489, 496, 106 P. 464, 467 (1910); and that principles of trust and agency law apply, *Stewart*, 69 Kan. at 505, 77 P. at 280; Mulvane v. O'Brien, 58 Kan. at 473, 49 P. at 612; Thomas v. Sweet, 37 Kan. at 207, 14 P. at 557. No Kansas court has decided a case precisely like the one before us, and neither has any other court so far as we can ascertain. Kansas courts have required a director-officer to surrender a secret profit he made while serving as agent in the sale of a fellow shareholder's stock, Mulvane v. O'Brien, 58 Kan. 463, 49 P. 607 (1897), and have required a director-officer to disgorge a commission he received from a purchaser of corporate property. Consolidated Oil, Gas & Mfg. Co. v. Overfield, 113 Kan. 294, 214 P. 809 (1923).

Ritchie implicitly recognizes that a director-officer who is a shareholder wears two hats: first, as owner of stock who may sell at the best obtainable price, and second, as fiduciary to the corporation and its shareholders. *Ritchie* holds that the power to control the corporation through majority stock ownership is not a corporate asset which must be shared with all stockholders; in a sale of stock, the role as owner takes precedence over the role as fiduciary. Thus, as a general rule a director, officer, and majority shareholder may freely negotiate a sale at a premium price of his or her stock and the benefits incident to majority ownership: the power to determine who will serve as officers and directors and, through them, the policy of the corporation.

While Brown had substantial stock ownership and is entitled to the benefit of *Ritchie*'s control sales doctrine, Kitch owned no stock;[7] *Ritchie* therefore does not apply directly to Kitch. Nevertheless, Kitch argues that his duties as director, assistant secretary, and nonsalaried lawyer did not demand his entire time and skills, and he could sell his time and skills as lawyer and negotiator to Brown or other shareholders. We recognize that Kitch could certainly have done so if he had resigned his corporate positions before he accepted employment with the majority shareholders,[8] or if the services involved no conflict with the interests and desires of the corporation or its shareholders.

Kitch, however, did not resign his positions. He continued as director, officer, and counsel for the newspaper corporation until the sale was consummated. We do not decide whether a director or employee must always give up the position to serve one group of shareholders against another.[9] In the instant case we have the additional element that Kitch served his own interests against the will of the plaintiffs, when he owed them a fiduciary duty.

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[7] We do not imply that ownership of "qualifying" shares or a nominal amount of stock would necessarily place Kitch in Brown's position. We also do not imply that if Brown took a commission for himself from Ridder on sales of the minority shareholders' stock he would be shielded from liability by the control sales doctrine of *Ritchie*.

[8] Even if he resigned, Kitch could not have used confidential information he had acquired while working for the corporation against the interests of those he previously served. *See* Parsons Mobile Products, Inc. v. Remmert, 216 Kan. 256, 260 531 P.2d 428, 432-33 (1975).

[9] We recognize that corporate shareholders often disagree and a director, officer, or corporate counsel may owe his or her position to one faction. In voting as a member of the board of directors, acting for the corporation at the direction of the board or an officer with authority, or making judgments as an employee, the individual may often act contrary to the wishes of some shareholders. Most disagreements are over corporate policy and hence involve only the fiduciary's duty of due care. These situations are distinguishable from the duty of loyalty, properly defined, owed by a director, officer or employee.

An attorney also has a fiduciary duty of undivided loyalty to his or her

The jury could find Kitch acted for his own pecuniary interest by procuring a finder's fee from Ridder for the sale of the plaintiff shareholders' stock without their consent. He thus violated an established rule that no fiduciary or agent may serve his own interests or those of a third party by accepting a secret commission from the third party. Restatement (Second) of Trusts § 170(1) comment o (1959); Restatement (Second) of Agency § 388 (1957). These principles apply as well to directors and officers. Consolidated Oil, Gas & Mfg. Co. v. Overfield, 113 Kan. 294, 214 P. 809 (1923); Mulvane v. O'Brien, 58 Kan. 463, 49 P. 607 (1897).

Kitch argues no violation because the plaintiffs in effect ratified his actions: if he owed a duty to plaintiffs, they consented to his finder's fee by selling their stock; they could have avoided contributing to his fee by simply retaining their stock in the corporation. We treated this situation specifically in *Delano I*, 542 F.2d at 553, and adhere to that position here. Ratification is not effective in favor of the fiduciary and against the beneficiary if the beneficiary must act to protect his or her own interests or acts under duress imposed by the fiduciary. *Cf.* Restatement (Second) of Trusts § 218(2) (c) (1959) (trustee cannot obtain beneficiary's ratification through improper conduct); Restatement (Second) of Agency § § 101, 462 (1957) (agent cannot force principal to ratify under duress). Plaintiffs acted under duress and to protect their interests. They learned of the contract after a

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client as codified in Canon 5 and the related Ethical Considerations and Disciplinary Rules of the American Bar Association Code of Professional Responsibility. *E.g.*, Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225, 232-33 (2d Cir. 1977); Financial General Bankshares, Inc. v. Lance, No. 78-0276, slip. op. at 31 (D.D.C. July 31, 1981). The Kansas Supreme Court and United States District Court for the District of Kansas have adopted the Code.

Plaintiffs rely on Financial General Bankshares, Inc. v. Lance, No. 78-2076 (D.D.C. July 31, 1981), to show that Kitch breached his professional duties under the Code, and argue that we should affirm the jury's verdict on this basis. Plaintiffs, however, did not specifically and separately address at trial Kitch's duties as legal counsel, and we decline to inject the issue of whether the Code should serve as the basis for private litigation into this action.

majority had already agreed to it and when they had only ten days to decide whether to participate.[10] If they did not sell, plaintiffs would find themselves in a significantly different position: although still minority shareholders, they would no longer be involved in a family-owned company in which no one person owned a majority, but in a company controlled by a newspaper conglomerate.

Justice (then Judge) Cardozo's oft-cited words descibe the duty of a fiduciary as follows:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions."

Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928). Perhaps these sentiments declare too strict a standard for the complex demands of corporate business. But our reading of the Kansas cases convinces us that Kansas would proscribe Kitch's conduct toward the plaintiff shareholders and require Kitch to surrender his 3% commission on the sale of their stock.

III

Kitch maintains that the trial court erred in not granting a new trial because of inconsistent verdicts. The jury found in favor of plaintiffs on their claims that Kitch had breached his fiduciary duty. As directed by the court's instruction that a fiduciary who has violated his duties to his beneficiaries must surrender to them whatever profit he has received, the jury concluded that Kitch must disgorge his commission.

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[10] *See* note 3 *supra*.

The jury also found against plaintiffs on their claims that the newspaper could have been sold for more than it was. Kitch contends that for the jury to be consistent with its verdict returning plaintiffs' portions of the finder's fee, it should have found that the newspaper could have been sold for an additional amount equal to the fee.

A court will find jury verdicts inconsistent when it cannot fairly harmonize the answers. Gallick v. Baltimore & O.R.R., 372 U.S. 108, 119 (1963). We can, however, harmonize the jury's verdicts. Kitch cannot deny that he realized a profit from the sale. Kitch's realization of a profit does not mean that Ridder would necessarily have paid more if there was no finder's fee—evidence was introduced that Ridder regarded the finder's fee as a cost unrelated to the purchase price. Alternatively, the jury could have discounted the effect of the finder's fee upon the sales price because it had decided that Kitch must give up his finder's fee on plaintiffs' stock, in effect adding the fee to the price realized by plaintiffs. The jury's findings were not necessarily inconsistent.

Kitch next focuses upon allegedly erroneous instructions. He claims the court's instruction that the transaction was "a sale of the entire corporation" is inconsistent with placing the burden of proof on Kitch to show that he had complied with his fiduciary duties. Kitch maintains that if the sale were of the entire corporation, a majority of the stockholders could ratify the entire transaction, including his fee, and the burden would fall upon the objecting stockholders to show the transaction was inconsistent with sound businss judgment. As we note above, however, this case concerns a fiduciary's duty of loyalty, akin to the duty of an agent not to serve conflicting interests of a third party and not to accept compensation from a third party with whom he contracts on behalf of his principal unless the principal expressly approves. The trial court therefore properly required Kitch to prove he had complied with his fiduciary duty, and the instruction on the sale of the entire corporation was neither necessary nor prejudicial error.

Finally, Kitch complains that the trial was unfair. Kitch complains specifically about the plaintiffs' characterization of the secret sales negotiations as wrongful; the plaintiffs' emphasis on Kitch's failure to pursue a stock-for-stock exchange when minority stockholders have no right to such an exchange; Delano's suggestion that Kitch should be punished for suggesting that Ridder should not make its offer available to Delano; and plaintiffs' emphasis on long-standing family tensions among the shareholders. According to Kitch, these unfair comments and characterizations infected the jury with passion and prejudice against Kitch. Kitch also stresses the trial judge's statements concerning fairness we have quoted from the November 20, 1978 order on posttrial motions as well as the trial judge's statements at oral argument on April 13, 1979.

We note first that the trial judge has granted a new trial on punitive damages and on Brown's liability to Bloom. Kitch's contentions, then, must go to whether the judge should have granted a new trial on his liability for the finder's fee. Kitch's specific complaints do not warrant a new trial on this issue. As we have analyzed Kitch's legal duty to the minority shareholders, the issue is primarily legal. There is no dispute that Kitch retained his position as a director, officer, and legal counsel to the corporation throughout. There is no essential dispute on the other facts relevant to his liability to repay the fee he collected for the sale of plaintiffs' stock. Kitch assumed he owed no fiduciary duty to these shareholders with respect to this transaction or that they effectively ratified his fee arrangement by selling their stock. We have held differently. The trial judge's posttrial statements indicate his primary concern was the conflict he perceived between *Delano I* and *Ritchie*. Since we have determined *Ritchie* does not shield one in Kitch's position, the judge's comments about fairness are not relevant.[11] No new trial on this issue is necessary.

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[11] The trial judge also commented on the inflammatory closing argument by Delano's counsel. The judge thought the argument "inflamed this jury to such a point that they were just geared up to do anything and everything that they thought they could do to Mr. Kitch." (R. XXVI, 37). The April hearing occurred more than seven months after the jury re-

IV

Cross-appellants Delano, Bloom, and First National Bank claim that the trial court's posttrial rulings favoring Kitch and the order granting Brown a new trial are contrary to law and the record and are wholly capricious. In its posttrial orders of November 17, 1978, the trial court refused to award the costs of the action to plaintiffs, assessed no prejudgment interest against Kitch, vacated the punitive damages award against Kitch, and vacated the jury's verdict finding Brown jointly liable with Kitch for Kitch's finder's fee. The court ordered a new trial on the issues of punitive damages and Brown's liability.

Regarding the refusal to award costs, Fed. R. Civ. P. 54(d) provides that they "shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." When a trial court refuses to award costs to the prevailing party, it must state its reasons so that the appellate court will have a basis for judging whether the trial court acted within its discretion. Serna v. Manzano, 616 F.2d 1165, 1168 (10th Cir. 1980). The trial court ordered each party to bear its own costs because the defendants prevailed in the first action and the plaintiffs in the second. However, we agree with the plaintiffs that the defendants did not prevail in the first trial inasmuch as this Court reversed the judgment for defendants. The defendant Kitch therefore must pay plaintiffs' costs.

Plaintiffs also object to the trial court's failure to award prejudgment interest at the rate of 6% per annum from April 30, 1973, to August 31, 1978. The trial court concluded, "Plaintiffs' various claims involve unliquidated damages

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turned its verdict and is the first time the record discloses any concern over the allegedly inflammatory nature of the closing argument made by Delano's counsel. Defendants' counsel made no contemporaneous objection and did not raise the issue in posttrial motions. The trial judge did not call Delano's counsel at the time of argument or mention his concern about the closing until the April hearing. The trial court gave no specific examples of how or why the closing was inflammatory. We have read the closing arguments, admittedly a cold record, and find counsel's argument zealous but not inflammatory.

and do not entitle plaintiffs to prejudgment interest." Under Kansas law, plaintiffs are entitled to prejudgment interest on a liquidated claim. Kan. Stat. Ann. § 16-201. A claim is liquidated "when both the amount due and the date on which it is due are fixed and certain, or when the same become definitely ascertainable by mathematical computation." First Nat'l Bank of Girard v. Bankers Dispatch Corp., 221 Kan. 528, 562 P.2d 32, 40 (1977).

The record supports the liquidated nature of the claim. As reflected in the pretrial order, plaintiffs claimed definite dollar amounts equal to their proportionate shares of the finder's fee. The trial judge instructed the jury as follows: "If you find from the evidence that the plaintiffs are entitled to damages by reason of the finder's fee paid to Kitch, it is your duty to award each plaintiff his share of the finder's fee paid to Kitch."

The jury determined that Kitch had breached his fiduciary duty to plaintiffs and must give up the profits he had wrongfully gained. Since those damages were a sum certain, the trial court erred in refusing to award interest at 6% per annum from April 30, 1973, to August 31, 1978.

Delano and Bloom appeal the trial court's order granting a new trial on the issues of Kitch's liability for punitive damages and Brown's liability for Kitch's finder's fee. Orders granting a new trial, however, are not final and appealable. Stradly v. Cortez, 518 F.2d 488, 491 (3d Cir. 1975); Kanatser v. Chrysler Corp., 195 F.2d 104 (10th Cir. 1952), *cert. denied*, 344 U.S. 921 (1953).[12] Alternatively, Delano and Bloom have asked this Court to treat the "appeals" as applications for leave to file petitions for writs of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *See* State Farm Mut. Auto. Ins. Co. v. Scholes, 601 F.2d 1151, 1154 (10th Cir. 1979).

In *Allied Chemical Corp. v. Daiflon, Inc.*, _____ U.S.

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[12] Brown moved to dismiss Bloom's appeal on this basis. We deferred ruling on the motion and ordered that Brown present this issue at oral argument.

_____, 101 S.Ct. 188 (1981), the Supreme Court reversed *per curiam* our issuance of a writ of mandamus that would have prohibited the trial judge from conducting a new trial. The Court noted that a writ of mandamus should issue only in exceptional circumstances amounting to a judicial usurpation of power. To gain this extraordinary relief, a party must establish the absence of other adequate means to attain the desired relief and a clear and indisputable right to issuance of the writ. The Court then stated:

> "A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant 'has no other adequate means to seek the relief he desires.' The authority to grant a new trial, moreover, is confided almost entirely to the exercise of discretion on the part of the trial court. Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' Will v. Calvert Fire Ins. Co., 437 U.S. 655, 666 (1978) (plurality opinion)."

Allied Chemical, ____ U.S. ____, 101 S.Ct. at 188. In the case before us, Delano and Bloom have failed to establish that they lack all other adequate means to relief and that they have a clear and indisputable right to issuance of writs of mandamus. Thus, no writs will issue.

V

Bloom and First National Bank raise several issues in their cross-appeals. Bloom contends the trial court abused its discretion when it permitted Brown and Kitch to withdraw certain admissions they had made several years earlier. In the amended complaint of May 21, 1973, plaintiffs alleged:

> "9. In his negotiations and discussions with respect to the sale of the stock of the Company, Brown demanded a

> long term employment contract substantially in excess of his then current salary with the Company. Brown would not negotiate or discuss in any way the sale of the stock of the Company unless the prospective purchaser agreed to give him the aforesaid employment contract.
>
> "10. . . . Early in the negotiations, Ridder was advised of Kitch's demand for a broker's fee and Brown's demand for a long term employment contract."

In his answer filed May 25, 1973, Brown admitted these allegations. At the second trial in 1978, Brown attempted to introduce evidence contrary to the admissions in the earlier pleadings. The trial court overruled the objection of Bloom's counsel and prohibited him from reading the admissions to the jury at that time.

The trial court subsequently stated that Brown's admissions had been superseded by the pretrial order filed before the second trial, an order that contained no reference to such admissions. The order expressly included among defendants' contentions the following: "The employment contract was a normal contract provision. Ridder, not Brown, was the beneficiary *and the one requiring the provision*." (Emphasis added.) Thus plaintiffs were on notice that defendants disputed the issue whether Brown demanded the employment contract as a condition precedent to the stock sale.

The trial court was right, of course, that the pretrial order supersedes the pleadings. Having failed to object to that order, Bloom and First National Bank cannot object to Brown's testimony in support of the contentions contained in the pretrial order. The trial court subsequently allowed plaintiffs' counsel to read the admissions to the jury "as party admissions and competent evidence, but not as judicial admissions which cannot be controverted." While the attorneys expressed some confusion over whether the statments were "contentions" or "party admissions," the trial court properly instructed the jurors that the statements covered issues they were to resolve.

Bloom also maintains the trial court abused its discretion

when it reopened the case to permit surrebuttal by Kitch. At trial Kitch testified that he had narrowed the list of prospective purchasers to four by studying information in the "Securities and Exchange Commission's offices, in their library." Kitch stated he visited that library in Washington, D. C., for about three days in September or October 1972. On rebuttal plaintiffs produced a list of visitors to the library of the SEC's Headquarters Office for September 8, 1972, through December 19, 1972. Kitch's name was not on the list. Kitch sought surrebuttal to testify concerning the list, but when the plaintiffs objected, the trial court denied the request. After Kitch made a proffer of his evidence out of the hearing of the jury, the court informed the parties and jury that the case was closed and that closing arguments would begin after lunch. That afternoon the court changed its mind and permitted Kitch's surrebuttal and then cross-examination by Delano's counsel.

Reopening a case for additional evidence is within the discretion of the trial court. Hickok v. G. D. Searle & Co., 496 F.2d 444, 447 (10th Cir. 1974); Nichols v. United States, 460 F.2d 671, 675 (10th Cir.), *cert. denied*, 409 U.S. 966 (1972). The record does not indicate that the court's unexpected change of position prejudiced any party. We hold the trial court did not abuse its discretion by permitting surrebuttal by Kitch.

Bloom asserts the trial court should have granted judgment against Brown notwithstanding the verdict (n.o.v.) because he breached a fiduciary duty to her by demanding an employment contract for himself as a condition precedent to the stock sale. Although First National Bank settled with Brown on this issue, both Bloom and First National Bank contend Kitch is jointly liable with Brown on this claim and ask for the entry of judgment n.o.v. against Kitch.

Judgment n.o.v. is proper only when the evidence so strongly supports an issue that reasonable minds could not differ. Symons v. Mueller Co., 493 F.2d 972, 976 (10th Cir. 1974); Swearngin v. Sears Roebuck & Co., 376 F.2d 637, 639 (10th Cir. 1967). The jury instruction, to which Bloom and First National Bank did not object, was general, asking only

that the jury award damages if the employment contract was a breach of fiduciary duty. We must determine if reasonable minds might differ.

Even if Brown insisted upon a continuing employment contract, it is not *per se* a violation of the fiduciary duty of loyalty to other shareholders to negotiate such an agreement as part of a stock sales contract. *See* McDaniel v. Painter, 418 F.2d 545 (10th Cir. 1969). The continued employment of one or more major officers of the corporation "reflect[s] the high concern of all parties that the transaction period be as smooth and businesslike as possible." *Id.* at 548. The employment contract may not be used to defraud; for example, to make continuing shareholders bear part of the stock purchase price. But plaintiffs were not continuing shareholders, and they requested no instructions directed to the reasonableness of Brown's salary, term of employment, or services required.

An employment contract is certainly permissible if the salary paid is reasonable in regard to the services performed. A $65,000 annual salary and a term of nine or ten years is not unreasonable on its face for services as president and chief executive officer of a newspaper which sold for $42,000,000. The contract did not guarantee employment; it was terminable for mental or physical illness, for failure to perform assigned duties properly, or for action adverse to the newspaper's best interests. It required Brown to devote "full productive time, energy and ability" to the corporation's business. Further, the record contains substantial evidence that neither Brown nor Kitch made Brown's continued employment a condition precedent for the stock sale. Ridder's representative in the negotiations with Kitch and Brown testified that the employment contract was not a precondition to the sale. Ridder did not negotiate the employment contract with Brown until after it had agreed on the stock sale's principal terms, and Brown accepted the term and salary first offered by Ridder.

Reasonable minds might differ on whether the employment contract was a breach of fiduciary duty. In view of the evidence presented and plaintiffs' failure to object to the in-

struction or to request instructions relating to the reasonableness of the particular contract, the court did not err in denying the motion for judgment n.o.v.

Bloom and First National Bank both urge that the trial court should have granted judgment n.o.v. on the issue of the newspaper's sale price. The jury found that the conduct of Brown and Kitch had not reduced the price Ridder would have paid. Substantial evidence supports the jury's verdict. Several newspaper representatives testified that the Wichita newspaper had brought a high cash price. The evidence does not clearly establish that the employment contract depressed the sales price. According to the testimony, the selling shareholders might have obtained a higher dollar value in a stock-for-stock exchange than in a cash sale. However, there was substantial evidence of serious disadvantages to accepting stock for payment. Because reasonable minds could differ on this issue, the jury's verdict must stand.

With respect to assessment of costs and prejudgment interest, the judgment and orders of the trial court are reversed and remanded with directions to assess costs against Kitch for all proceedings prior to the instant appeal and to require him to pay prejudgment interest on the award in favor of plaintiffs at the legal rate. In all other respects the judgment is affirmed. All parties shall bear their own costs for this appeal except appellee Brown, whose costs shall be paid by cross-appellant Bloom.

NOVEMBER TERM - December 8, 1981

Before Honorable William E. Doyle,
Honorable Monroe G. McKay, and
Honorable James K. Logan, Circuit Judges

VICTOR DELANO,	)	Appendix B
Plaintiff-Appellee,	)	
v.	)	Nos. 79-1065
PAUL L. KITCH,	)	79-1066
Defendant-Appellant,	)	79-1067
VICTORIA BLOOM,	)	79-1068
Defendant-Appellee.	)	

This matter comes on for consideration of the outstanding motions pending in the captioned appeals as of December 3, 1981. The Court has considered the responses in opposition to such motions.

Upon consideration whereof, it is ordered as follows:

1. Appellant's (Kitch) motion to file an oversize petition for rehearing is granted.

2. The motion to correct opinion is denied.

3. The motion to certify a question of state law is denied.

4. The motion requesting another judge try the case in the new trial on punitive damages is denied.

5. The motion for immediate relief by full supersedeas bond or issuance of mandate is denied.

6. The motion of Delano for costs in the first Delano appeal is denied as filed too late.

7. The petition for rehearing is denied by the panel that rendered the decision in the captioned appeals. The clerk

transmitted the suggestion for rehearing en banc to the members of the panel and to the judges of the Court who are in regular active service. No judge in regular active service or who was a member of the panel who rendered the decision requested a vote on the suggestion made for rehearing en banc.

It is ordered that the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

Opposition

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Supreme Court, U.S.
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No. 81-1646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PAUL R. KITCH,

Petitioner,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' JOINT MEMORANDUM OPPOSING CERTIORARI

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Respondents Victor Delano, First National Bank in Wichita, as Executor, and Victoria Bloom (Plaintiffs-Appellees and Cross-Appellants below, *see* Pet. A-2), believing the instant petition for certiorari to be wholly insubstantial, waive their right to file separate, formal briefs in opposition and in lieu thereof submit this Joint Memorandum,[1] as follows:

As appears from the thorough opinion of the Court of Appeals (Pet. A-1 to A-22), this case involves nothing more than the identification and application of long-

[1] *See* R. Stern and E. Gressman, *Supreme Court Practice* ¶ 6.35 (5th ed. 1978). *Cf.* Rule 33.2(b)(2), Rules of the Supreme Court of the United States. Respondents are of course prepared to submit formal briefs in opposition, should this Court so desire.

standing Kansas law by a federal court sitting in diversity.[2]

The questions raised by the petition—whether the Court of Appeals reached an erroneous result in its considered determination of a question of Kansas law, or abused its discretion in thereafter denying petitioner's request for certification[3]—present no issue worthy of this Court's review. *See Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976); *Lindsey* v. *Normet*, 405 U.S. 56, 83 (1972) (Douglas, J., dissenting in part); *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U.S. 273, 281-282 & n.2 (1959) (Frankfurter, J., dissenting); *General Box Co.* v. *United States*, 351 U.S. 159, 165 (1956); *id.*, at 169-170 (Douglas, J., dissenting); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949); *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944) (per curiam).[4]

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[2] The unanimous opinion below, which rejected after full consideration petitioner's crabbed version of Kansas fiduciary duty law (Pet. A-5 to A-13), was authored by Circuit Judge James K. Logan, a former assistant professor, professor, and dean of the University of Kansas Law School (1957-1968), and practicing Kansas attorney thereafter until his appointment to the Court of Appeals in 1977.

[3] Notwithstanding that the statutory certification procedure had been available since July 1, 1979, *see* Kan. Stat. Ann. § 60-3201 (Supp. 1981), petitioner failed to raise the issue below (i) in any of his briefs, the first of which was filed in December 1979; (ii) at oral argument in September 1980; or (iii) in any of his post-argument submissions to the Court of Appeals. Rather, petitioner's request for certification was tendered only *after* the appellate court's decision in October 1981—more than two years after certification was made available. In addition to being devoid of merit, petitioner's certification request was inexcusably late. *See Lehman Bros.* v. *Schein*, 416 U.S. 386, 394-395 (Rehnquist, J., concurring).

[4] In view of the Court of Appeals' careful analysis and application of Kansas law, there is simply no support for petitioner's bald assertions that the court "refused to follow the state law" and "create[d] [its] own common law . . . ." Pet., at 6, 11. This is clearly not a case presenting an express (or even an implicit) refusal by federal appellate court to apply the governing state

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: April 2, 1982

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law in a diversity case, as in *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3 (1975) (per curiam). Indeed, the first opinion of the Court of Appeals in this case, *Delano* v. *Kitch*, 542 F.2d 550 (CA 10 1976), which set forth the governing Kansas principles of fiduciary duty, has since been cited and applied with unqualified approval by both the Kansas Supreme Court and the Kansas Court of Appeals. *Newton* v. *Hornblower, Inc.*, 224 Kan. 506, 582 P.2d 1136 (1978); *Sampson* v. *Hunt*, 222 Kan. 268, 564 P.2d 489 (1977); *Ritchie* v. *McGrath*, 1 Kan. App. 2d 481, 571 P.2d 17 (1977).

Opposition

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MEMORANDUM BRIEF OF RESPONDENT HARRY BRITTON BROWN, JR.

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM BRIEF OF RESPONDENT HARRY BRITTON BROWN, JR.

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MEMORANDUM BRIEF OF RESPONDENT HARRY BRITTON BROWN, JR.

I. ACCEPTANCE OF PETITIONER'S STATEMENT OF QUESTIONS PRESENTED AND JURISDICTIONAL STATEMENT.

For purposes of the instant Petition for Writ of Certiorari only, Respondent Harry Britton Brown, Jr.,

Defendant-Appellee below, (hereinafter "Respondent Brown" or "Brown") accepts Petitioner's statement of questions presented for review and jurisdictional statements, *see* Pet. at i, 1-2, 4.

Respondent Brown also generally accepts Petitioner's "Statement Of The Case," *see* Pet. 2-6, but respectfully submits the following supplemental emendations specifically related to Respondent Brown so that the Court may better understand the particular, and presently limited, position of Respondent Brown in this proceeding.

II. SUPPLEMENTAL STATEMENT OF CASE AND SUMMARY OF PERTINENT PROCEEDINGS AS APPLIED TO RESPONDENT BROWN.

A. Emendations to Petitioner's Statement of Material Facts.

The basis for all the various actions in which the parties now before this Court have been mutually involved during the past several years arose from the offer made in February, 1973 by Ridder Publications, Inc. (hereinafter "Ridder") to purchase shares in the Wichita Eagle-Beacon Publishing Company, Inc., owned by Respondent Brown and others including Respondents Victor Delano (hereinafter "Delano"), First National Bank of Wichita as Executor (hereinafter "Executor Bank"), and Victoria Bloom (hereinafter "Bloom"). All of the then existing shareholders were individually minority shareholders, including Respondent Brown, and all of the shareholders, including all Respondents in this proceeding, ultimately accepted the offer tendered by Ridder. *Delano v. Kitch*, 663 F.2d 990, 994 (10th Cir. 1981); Pet. App. A at A3-4.

In the autumn of 1972, Respondent Brown decided to sell the shares he owned in the Eagle-Beacon Newspaper

Company, and his primary motivation was potential estate tax problems, particularly those arising because Brown's wife had become seriously ill during the summer of 1972.[1] Another motivation was that Brown had reached his own limits of tolerance for the family's long-standing and virtually continuous feuding.[2] He discussed his desires and reasons for the proposed sale with Mr. Kitch.[3] Brown told Mr. Kitch that despite the history of family feuding, Brown would require as a condition of selling his shares that every shareholder be able to receive the same price per share as that paid to Brown,[4] and that if Mr. Kitch were able to find an appropriate buyer for his shares or any other shares, any fee or commission that Mr. Kitch might obtain would be required to be paid by the buyer.[5]

After a series of negotiations and discussions with various parties who were potential purchasers, Ridder and Brown executed an option contract at the end of February, 1973.[6] In order to exercise their option the shareholders were required to tender 32,000 out of the 60,000 shares and Brown was required to enter a long-term employment contract with Ridder, terminable at will by Ridder, as a condition precedent to performance by Ridder of its obligations under the contract.[7] The

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[1]Petitioner elected not to request that the Record on Appeal to the Tenth Circuit in *Delano v. Kitch*, 663 F.2d 990 (10th Cir. 1981) be transmitted to this Court in connection with his Petition because Petitioner agreed with the Tenth Circuit's statement that its opinion was based on facts that were largely undisputed. *See* Pet. at 2. Citation to facts established in that Record in the footnotes in this Brief of Respondent Brown are to the Record of Appeal in the Tenth Circuit. Parentheses are used to indicate that Record. (R. Vol. 23, 917, 913; R. Vol. 24, 1244)

[2](R. Vol. 23, 914-915, 918)

[3](R. Vol. 23, 915-917)

[4](R. Vol. 23, 915-916)

[5](R. Vol. 23, 917)

[6](R. Vol. 27, Ex. 5) (R. Vol. 23, 921-922, 924-925, 929-930, 934-949, 952-966) (R. Vol. 23, 761-63; R. Vol. 23, 810-12; R. Vol. 24, 1008)

[7](R. Vol. 27 Ex. P)

option contract specified that the same price per share was to be paid to each shareholder who decided to sell to Ridder,[8] and was to remain open to all shareholders for ten days.[9]

B. SUMMARY OF PERTINENT PROCEEDINGS AS APPLIED TO RESPONDENT BROWN.

Respondent Delano initially sued in federal court with jurisdiction based on diversity of citizenship praying for injunctive relief, essentially asking to enjoin and unwind the transaction, and Delano asserted additional claims for damages. Respondents Bloom, Executor Bank and Brown and Petitioner Kitch were named as co-defendants in that action. After a trial on the injunctive claims resulting in dismissal of the injunctive claims and an attempted expedited appeal, both occurring in April, 1973, that case was ordered to trial on Delano's damage claims. The alignment of the parties had by that time changed when Respondent Bloom and Respondent Executor Bank, after the completion of the sale of all of their shares to Ridder, filed cross-claims for damages against some of the shareholders and Mr. Kitch.[10]

The first trial upon the damage claims and cross-claims of Delano, Bloom and the Executor Bank was completed in 1974. Upon appeal, the Circuit Court of Appeals for the Tenth Judicial Circuit (hereinafter "Tenth Circuit") reversed the judgments entered in favor of the various defendants and ordered new trials for Respondent Brown and Petitioner Kitch. *Delano v. Kitch*, 542 F.2d 552 (10th Cir. 1976), *opinion on motion for*

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[8](R. Vol. 27 Ex. P)

[9](R. Vol. 27 Ex. P)

[10]The Executor Bank included Respondent Brown and Petitioner Kitch in its cross-claims; Respondent Bloom included only Petitioner Kitch, but was allowed over objection to amend her complaint upon oral motion to include a cross-claim against Respondent Brown approximately four years later on the eve of the second trial in August of 1978.

clarification, 554 F.2d 1004 (10th Cir. 1977) (hereinafter "*Delano I*").

After issuance of the mandate in *Delano I* but before the new trials therein ordered were commenced, the Court of Appeals for the State of Kansas issued its superseding and supervening opinion in *Ritchie v. McGrath*, 1 Kan. App. 2d 481, 571 P.2d 17, *petition for review denied*, 222 Kan. 749 (1977) (hereinafter, "*Ritchie*"). *Ritchie* then became the source of the controlling state law for the retrial in the consolidated actions for damages, all of which were based on diversity jurisdiction.[11]

Ritchie was an action by minority shareholders for recovery of a proportionate share of a premium paid for defendants' shares of capital stock representing a majority interest in a closely-held Kansas bank corporation. Plaintiffs claimed breaches of various alleged fiduciary duties by defendants, including defendant McGrath who, like Respondent Brown, was an officer and director of the corporation as well as a shareholder. Defendants, pursuant to an oral agreement and over a five-year period, increased their holdings to a majority of outstanding shares, executed a pooling agreement, negotiated and contracted for sale of their majority shares for $80 per share. All such activity was accomplished without any disclosure whatsoever to other directors or other shareholders not members of the majority group until the day before the transaction selling the majority of the shares was closed. After closing, the minority shareholders agreed to the sale of their stock (to those who had

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[11] *See West v. American Tel. & Tel.*, 311 U.S. 223 (1940); *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956). *Cf., Comm'r. v. Estate of Bosch*, 387 U.S. 456, 465 (1967) ("[T]he underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. If there is no decision by that Court, then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.")

purchased majority shares) at $50.20 per share, an amount representing the book value of the stock.

Ritchie held under the law of Kansas that there was no breach of any fiduciary duty by any of the defendants, including McGrath, arising from the defendants' actions.

> We conclude that there was not a breach of fiduciary duty of the defendants as officers, directors, or dominant shareholders in the manner in which they acquired their additional shares, nor in pooling their interests to provide a controlling interest, nor in failing to disclose their objectives in purchasing stock or their pooling agreement, nor by inviting some but not all of the minority shareholders to join with them in a sale at a premium price.

Ritchie v. McGrath, 1 Kan. App. 2d at 491, 571, P.2d at 24. The Kansas Court of Appeals also further held that "defendants violated no duty in not disclosing to the plaintiffs the offer to purchase a majority of the stock," *id.* at 490, 517 P.2d at 23, and that "the defendants' sale of bank stock, which collectively amounted to the controlling interest in the bank, was not the sale of a corporate asset." *Id.* at 493, 517 P.2d at 25.

It was in the context of the superseding opinion of *Ritchie* that the second trial ordered by *Delano I* was tried to a jury in August, 1978. In the separate cases that were again consolidated for that second trial, Delano, the Executor Bank, and Bloom were treated as plaintiffs and the case was prosecuted against Petitioner Kitch and Respondent Brown as defendants. Upon verdicts and after various post-trial motions, all parties except Brown appealed, and the Tenth Circuit subsequently issued its opinion in *Delano v. Kitch*, 663 F.2d 990 (10th Cir. 1981) (hereinafter "*Delano II*").

The Tenth Circuit held in *Delano II* that Brown was "entitled to the benefits of *Ritchie, see* 663 F.2d 998, Pet. App. A at A-11, and thus Brown was authorized under Kansas law to assemble any group of shareholders who would constitute a majority of the stock in the corporation, to negotiate a sale of that majority interest at a price he chose without any obligation to cause that price to be offered to the minority shareholders, and to so act without any obligation to inform other shareholders of his actions or intentions.

As a result of *Delano II*, there are no judgments related to Respondent Brown that are before this Court for review.

During the second trial, Delano and the Executor Bank resolved their differences with Brown. *See* 663 F.2d at 994 n.4; Pet. App. A at A-4 n.4. Bloom's three claims for relief were submitted to the jury, and were subsequently appealed by Bloom in Case No. 79-1068 in the Tenth Circuit. None of Bloom's claims against Brown are before this Court for review.

One of Bloom's claims for relief alleged breaches by Brown and Kitch of fiduciary duties in connection with the employment contract for Brown that was required by Ridder as a condition precedent to Ridder's obligation to purchase any tendered shares. The jury's verdict was in favor of Brown (and Kitch). This judgment was affirmed by the Tenth Circuit in *Delano II* in accordance with the applicable Kansas law as stated in *Ritchie* and *McDaniel v. Painter*, 418 F.2d 545 (10th Cir. 1969). *See* 663 F.2d at 1003-1004; Pet. App. A at A-21, 22.

Bloom also asserted a claim for relief that alleged that Brown and Kitch were liable for not having obtained a sales price in excess of the $42,000,000 in cash that was paid for the purchase of the shares of all shareholders. The jury found in favor of Brown (and Kitch), and the Tenth Circuit affirmed that judgment in *Delano II*. *See* 663 F.2d at 1004; Pet. App. A at A-22.

Bloom's other claim for relief alleged unspecified breaches of fiduciary duties by Brown under Kansas law in connection with the per share fee paid by Ridder to Kitch. Notwithstanding objections by counsel, only a single general verdict form naming both Kitch and Brown was submitted by the trial court to the jury as to this claim for relief.[12]

Upon motions timely filed by Brown, the District Court, after hearing in November of 1978, granted a new trial for Brown as to this claim for relief by Bloom.[13] Bloom's attempts to appeal the trial court's order granting Brown a new trial were rejected by the Tenth Circuit in *Delano II. See,* 663 F.2d at 1001-1002; Pet. App. A at A-17, 18.

The opinion in *Delano II* was issued by the Tenth Circuit on October 23, 1981, and Bloom did not file a Petition for Rehearing and did not file a Petition for Writ of Certiorari in this Court.

Accordingly, the judgments entered upon the jury's verdict as to Bloom's claims for relief based upon the employment contract and failure to obtain a higher sales price are now res judicata as between Brown and Bloom and time has expired for review of those judgments by this Court. Bloom's sole remaining claim for relief against Brown for alleged breach of fiduciary obligation by Brown to Bloom for the per share fee paid by Ridder to Kitch awaits retrial in the District Court pursuant to the November, 1978 granting of Brown's motion for new trial.[14]

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[12](R. Vol. 5, 1557)
[13](R. Vol. 6, 1691-1694)
[14](R. Vol. 6, 1691-1694)

III. ARGUMENT.

The Tenth Circuit in *Delano II* held, *inter alia*, that Respondent Brown is "entitled to the benefit of *Ritchie's* control sales doctrine." *See* 663 F.2d at 998; Pet. App. A at A-11. The question of whether *Ritchie* applied as controlling state law to Respondent Brown has been answered affirmatively in *Delano II*, *id.*, and correctly.[15]

The instant Petition for Writ of Certiorari does not contest that holding of the Tenth Circuit in *Delano II* and the Petition presents issues for review related solely to Petitioner Kitch. *See* Pet. §I.A. ¶ 1, Sentence 1, at 7, 6-17. As previously noted in Section II.B. of this brief, *supra*, at p. 7-8, there are no judgments or issues as to Respondent Brown that are before this Court for consideration or review. Thus, Respondent Brown has no direct interest in the outcome of the particular issues presented to this Court by the instant Petition in its present posture.

Given Respondent Brown's lack of direct interest in the outcome of the specific issues presented by the instant Petition, and absent any expansion of those issues upon a grant of certiorari by this Court for Kitch's Petition, Respondent Brown raises no objection to the granting of the requested writ of certiorari for purposes of either review or certification to the Kansas Supreme Court of the question of whether the "benefits of *Ritchie*" also extend to a non-stockholder director and officer in the circumstances of Kitch's act.

Respondent Brown only urges that this Court give separate and independent consideration to Petitioner's arguments; determination of the merits of the Petition

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[15] *See Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941); *Huddleston v. Dwyer*, 322 U.S. 232 (1944); *Pierce v. Cook Co.*, 518 F.2d 720 (10th Cir. 1975).

may proceed without retention of Brown as a Respondent necessary to this proceeding.

More than nine years have elapsed since Brown sold his shares. More than nine years have elapsed since Respondent Delano, Executor Bank and Bloom originated this litigation. During that nine-year period, Brown has seen a judgment entered in his favor denying Delano's claim for injunctive relief, jury verdicts entered in his favor that were then reversed in *Delano I* on theories of liability rejected by the Kansas Court of Appeals in *Ritchie*,[16] two jury verdicts entered in his favor and affirmed in *Delano II* upon the basis of *Ritchie*, and the grant of a new trial upon the only jury verdict not in his favor.

Brown now finds that he is a Respondent in this Court, even though there are no judgments as to Brown that are before this Court for review and even though the Petition for Writ of Certiorari raises issues, substantial as they are, that are not directly related to Brown. Three and one-half years have elapsed since Brown was granted a new trial on Bloom's only remaining claim for relief, which is the only pending claim remaining in these consolidated cases against Brown.

Respondent Brown respectfully requests that the only case in which he is involved be remanded forthwith to the Tenth Circuit with instructions to remand the case to the District Court for proceedings in accordance with the District Court's Order For New Trial entered in November, 1978.

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[16] *Ritchie* specifically altered the effect and efficacy of *Delano I*, as is accurately explained in the Petition. *See* Pet. §I.B. ¶¶ 1, 2 at 8-9.

IV. CONCLUSION AND REQUEST FOR RELIEF.

For the reasons stated, Respondent Brown respectfully requests that this Court enter forthwith its Order:

1. Dismissing Brown as a Respondent in No. 81-1646 in the Supreme Court of the United States, October Term, 1981;

2. Remanding the case and action wherein Bloom's sole claim against Brown awaits retrial to the United States Court of Appeals for the Tenth Judicial Circuit with instructions to remand to the District Court for new trial.

Respectfully submitted,

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